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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

NO. 575

UNITY RAILWAYS COMPANY, a Corporation,
Petitioner,

v.

ANNA KURIMSKY, Administratrix of the Estate of
Stephen J. Kurimsky, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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Stephen J. Kurimsky, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Unity Railways Company, a corporation, respectfully prays that a writ of certiorari be issued to review the judgment entered in this case on November 10, 1947 by the Supreme Court of Pennsylvania by which that Court affirmed a judgment of the Court of Common Pleas of Allegheny County, Pennsylvania, which judgment affirmed a judgment in favor of the respondent and against your petitioner in the sum of Twenty-five Thousand ($25,000) Dollars.

JURISDICTION.

(a) Opinion of the Court Below.

The opinion of the Supreme Court of Pennsylvania is reported as *Anna Kurimsky, Administratrix of the Estate of Stephen J. Kurimsky, v. Unity Railways Company, a corporation,* 357 Pa. 521.

(b) Jurisdiction of This Court.

Said decision of the Supreme Court of Pennsylvania was entered on November 10, 1947 (R. 6 b). A petition for reargument was filed in due course but was denied on November 18, 1947 (R. 20 b). It is believed that this Court has jurisdiction to review the decision upon writ of certiorari under the provision of Section 237 of the Judicial Code, as amended (U.S.C.A. Title 28, 2nd Sec. 344), which provides as follows:

> "(b) It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority

exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review or a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

This case deals with the interpretation of the Federal Employers' Liability Act U.S.C. Section 51, et seq., 35 Stat. 65 (1908), 53 Stat. 1404 (1939), 45 U.S.C.A. Section 51 (1943).

QUESTIONS PRESENTED.

(1) Where an employee of a railroad company engaged in interstate commerce is killed during a shuttle operation, is the administratrix entitled to have her case submitted to a jury where the evidence fails to disclose any negligence on the part of the railroad company and where the evidence also fails to show that any negligence in the operation of the train was the cause of the employee's death?

(2) Where a case under the Federal Employees Liability Act is submitted to a jury and the jury returns a verdict in favor of the deceased employee's administratrix, should the verdict be allowed to stand where the inferences or conclusion drawn by the jury are unreasonable?

STATEMENT OF THE MATTER INVOLVED.

Prior to November 30, 1944 your petitioner was the owner of and operator of a small railroad company which was built to handle the coal output from mines located at Renton, Plum Township, Pennsylvania. The petitioner obtains coal cars from various railroad companies at interchanges, takes the empty coal cars to Renton where the coal is loaded and the cars are then returned to the interchanges, being loaded and returned to the connecting railroads.

The trackage of the petitioner consists of four miles of main track, one mile of branch line main track and about three miles of sidings. One of the interchange points, which is the interchange for the Bessemer and Lake Erie Railroad is at Unity Junction.

In 1924 Stephen J. Kurimsky started to work with the petitioner as a laborer and later became and at the time of his death was Supervisor of Tracks and he also acted as a brakeman.

On November 30, 1944 Stephen J. Kurimsky was acting as a member of the crew of a train as the fireman wished to go hunting and he was working as an extra brakeman. At about 6:30 P. M. on November 30, 1944 Stephen J. Kurimsky was killed during a switching operation of empty cars. Suit was instituted in the Court of Common Pleas of Allegheny County, Pennsylvania, by Anna Kurimsky, Administratrix of the Estate, under the provisions of the Federal Employer's Liability Act 45, U. S. C. Section 51, et sec, and under the provisions of the Act of 1907, Commonwealth of Pennsylvania, being the Act of June 10th, P. L. 523, section 172. There was no evidence of any violation of the safety

appliance Act or any other Act of Congress or any evidence of any violation of any regulation of the Interstate Commerce Commission. The only evidence as produced by the respondent was for the purpose of showing negligence in the operation of the train by a change in orders during the shifting operation without notice to the deceased, Stephen J. Kurimsky, and to show that the negligence caused his death.

This is not a case of conflicting evidence or inferences. This is a case of complete absence of probative facts to support the verdict of the jury as to negligence and more particularly as to proximate cause.

Practically all of the testimony in the case was offered by the respondent. This testimony was presented by the President of the petitioner and all of the remaining members of the train crew. The only testimony offered by the petitioner was to clarify and reiterate certain testimony in the respondent's case. The sum total of all of the testimony is that there is no testimony to show what was the cause of Stephen J. Kurimsky's death.

The facts concerning this accident are not in dispute and there is no real conflict of testimony. The operation of the train is best described by reference to plan marked Exhibit "A" and other plan attached (see appendix).

This accident occurred in the following manner, the point of accident being near the cross-over switch of the petitioner and the Bessemer and Lake Erie Railroad. At this point the tracks of both railroads extend in a north and south direction, the Bessemer and Lake Erie Railroad tracks being west of the petitioner's tracks. The most easterly track of the petitioner was

the main track. West of the main track was No. 1 sidetrack connecting with the main track at No. 1 switch. West of No. 1 sidetrack was No. 2 sidetrack, which connected with the main track at No. 2 switch at a point 98 ft. 8 in. north of No. 1 switch. At a point 54 ft. north of No. 2 switch was a switch called "Unity Crossover Switch" where a connecting track ran to the north bound Bessemer track.

At the time of the accident defendant's crew was made up of Keister, conductor; Walton, engineer; Frank Kurimsky, fireman; Kitsko, brakeman; Binkley, flagman; and Stephen Kurimsky, extra brakeman.

The following measurements are important. The locomotive and tender are together sixty-seven feet six inches long. Each hopper car is thirty-one feet five inches long. So the locomotive, tender and seven hoppers are together two hundred eighty-seven feet five inches long, to which should be added about six inches for each coupling, or about three feet. The caboose was about thirty feet long. The whole train, therefore, with the caboose attached, was about three hundred and twenty feet long and without the caboose it was two hundred ninety feet long. When the hopper doors are open there is a clearance of five and seven-eighths inches above the top of the rail, when the hopper doors are closed the clearance is seven and seven-eighths inches, but all hopper doors were open at the time of this accident.

At the start of the operations, which was for the purpose of moving seven empty hopper cars from No. 2 track to No. 1 track, the locomotive was on the Unity main track headed northwardly in the vicinity of the scale house. At this time the caboose was attached to

the front or northerly end of the locomotive. The order was given to Stephen J. Kurimsky by the conductor that "we'll get in on No. 2 and catch them seven small hoppers and set them over to No. 1 track". The engineer, Walton, therefore, backed into No. 2 track to pick up the seven hopper cars and on this southward movement of the locomotive and caboose Stephen J. Kurimsky rode on the steps at the north end of the caboose. Kurimsky dropped off opposite the No. 1 switch and walked over to that switch while Walton, the engineer, was bumping in the seven hoppers and making automatic coupling on No. 2 track. Stephen Kurimsky then walked northwardly to No. 2 switch in order to throw it after the cars had been pulled out of No. 2 track. Keister, the conductor, then threw the Unity cross-over switch located fifty-four feet north of No. 2 switch and then walked northwardly to the vicinity of the water tank close to the track leading to the northbound Bessemer and Lake Erie main track. The locomotive pulled the seven hopper cars out of No. 2 track through No. 2 switch and went over the cross-over on to the northbound Bessemer main track and came to a stop, or almost to a stop, with the front of the caboose at the point marked "X" on Exhibit "A" (see appendix), just near the south end of the scales. Keister, the conductor, called to Binkley, the flagman, while the train was on this north movement, to cut off the caboose. The train was proceeding at a speed estimated between four and ten miles per hour. After the train had come to a complete stop at the point just indicated Stephen J. Krimsky gave a lantern signal from switch No. 2, which was observed by Keister, who was then one hundred fifty to one hundred sixty feet north of switch No. 2, and Keister relayed the back-up signal to Walton, the engineer. It is agreed by all of the witnesses that

Stephen J. Kurimsky was last seen alive at No. 2 switch four or five feet east of the main track when he gave the back-up signal with his lantern. There is not one iota of testimony as to what Stephen J. Kurimsky did after he gave the back-up signal as above indicated. There is no testimony as to when he got on the train —if he did—or where he got on the train or where he fell off the train or how he got under the train or what caused him to fall or to get under the train. The Trial Court in its opinion states the facts as follows: (240 a)

> "Nobody really knew much about what actually did happen to cause Kurimsky's death".

After the train had backed up not more than one and one-half car lengths southwardly from the extreme north position in which it had stopped pursuant to order from Keister the train came to a complete momentary stop or almost to a stop. The testimony here is that there was some jerk or jolt caused by this stopping. The purpose of this stop was to cut off the caboose and was no different from numerous other stops.

As above described nothing was seen or heard from Stephen J. Kurimsky until after the train had been moved from its extreme northerly position where the lead car of the train was about forty-five feet south of No. 2 switch when the caboose had been completely cut off. The train moved southwardly into No. 1 track and came to rest with the front of the locomotive at the point marked "W" on Exhibit "A", this point being approximately one hundred sixty feet south of No. 1 switch. When Stephen J. Kurimsky did not appear to cut off the locomotive when it came to a stop at this position one hundred sixty feet south of No. 1 switch, search was made and his body was discovered under

the rear end of the locomotive between the third and fourth driving wheels with one leg projecting out over the easterly rail between the two driving wheels. The lantern, however, was found between the rails of the No. 1 track about forty feet south of No. 1 switch where the letter "L" has been placed on Exhibit "A". The only blood marks which were found were on the south end of the tender and on the wheels of the first and second cars from the tender and the hopper doors at the north end of the second car.

From the above review of the facts, which facts are stated in accordance with the testimony introduced by the plaintiff, it is readily apparent that there has been shown no negligence on the part of the defendant and that there is not one iota of testimony that even if an inference of negligence might arise, this negligence was the proximate cause of the death of Stephen J. Kurimsky.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

All of the facts necessary to the decision on petition of the respondent for writ of certiorari have been set forth in the statement of the matter involved.

The Trial Judge in his opinion stated as follows: (240 a)

> "Nobody really knew much about what actually did happen to cause Kurimsky's death."

In our opinion this is an overstatement. The fact is that none of the witnesses, who were all of the members of the train crew, knew what caused the death.

It is, of course, incumbent upon the respondent to prove negligence and further prove that the negligence was the proximate cause of Stephen J. Kurimsky's death. In *Toledo, St. Louis & Western Railroad Company v. Allen,* 276 U. S. 165, Mr. Justice Butler stated the rule as follows:

(p. 168)

"The plaintiff can not recover in the absence of negligence on the part of the defendant. Seaboard Air Line v. Harton, 233 U. S. 492, 502."

To the same effect is the case of *Gunning v. Cooley,* 281 U. S. 90, where the Court in its opinion by Mr. Justice Butler held:

(p. 94)

"A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the parties producing it, upon whom the onus of proof is imposed.' Citing Improvement Co. v. Munson, 14 Wall 442, Pleasants v. Fant, 22 Wall 116.

* * * * * * *

"Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury. Peoples Savings Bank v. Bates, 156 U. S. 556. So. Pac. v. Pool, 160 U. S. 438. 'Where a plaintiff produces

evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither.' Ewing v. Goode (Taft) 78 Fed. 442. See Patton v. Texas & Pacific Ry., 179 U. S. 658. New York Central v. Ambrose, 280 U. S. 486."

The Supreme Court of the United States in several recent cases, one of which is *Tennant, Admrx. v. Peoria & Pekin Union Railway Co.*, 321 U. S. 29, in an opinion by Mr. Justice Murphy said:

(p. 32)

"In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67. *Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.'* Galloway v. United States, 319 U. S. 372, 395; Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the twelve jurors." (Italics ours)

It will be noted in this case that the evidence showed and the case was sustained in favor of the claimant by reason of violation of the Railroad Company's rule re-

quiring ringing of an engine bell. The opinion on this distinction is as follows:

> "Tennant was employed by the defendant railroad company as a switchman in its yards. The evidence supported a fact finding that Tennant was killed by being run over by one of defendant's trains at a point where it was within his duty to be; that the engineer who operated the train had seen him before the train motion began, in a position with respect to the engine that was consistent with the performance by him of his duty in that respect and in that place; that the company rule required the ringing of a bell before such a train movement for the benefit of the members of the crew; and that the bell was not rung."

In the recent case of *Lavender v. Kurn,* 327 U. S. 645; 66 U. S. Supr. Ct. Rep. 740, Mr. Justice Murphy held that the scope of review on appeal was as follows: (p. 744)

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to disregard or disbelieve whatever facts are inconsistent with its conclusion."

In *Tiller v. Atlantic Coast Line,* 318 U. S. 54, the Court held as follows:

> "The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury."

Ellis v. Union Pacific Railroad Co., 329 U. S. 649, 91 L. E. 434, 67 S. C. 599 (1947), Mr. Justice Douglas, L. 653:

> "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must 'be in whole or in part' the cause of the injury. 45 U. S. C. § 51 Brady v. Southern R. Co., 320 U. S. 476, 484. Whether those standards are satisfied is a federal question, the rights created being federal rights. Brady v. Southern R. Co., supra; Bailey v. Central Vermont R. Co., 319 U. S. 350."

Of course, it is the position of your petitioner that this case should never have been submitted to a jury, that the Court should have granted defendant's motion for judgment of compulsory non-suit and that, therefore, the Trial Court having wrongfully submitted the case to the jury in the first instance, the mere fact that the jury returned a verdict in favor of the plaintiff does not improve the respondent's position. If there never was any evidence of negligence or proximate cause, the mere fact that the jury decided there was negligence and that this negligence was the proximate cause of the death would not improve the respondent's position.

In this connection we would like to call the Court's attention to the recent case of *Julia Eckenrode, Admin-*

istratrix of the Estate of John Eckenrode, deceased, appellant, v. Pennsylvania Railroad Company, CCA 3rd 1947 (not yet reported), where the Court reviewed the evidence and found that there was no evidence of negligence even though the jury had returned a verdict in favor of the plaintiff.

Even under the rules expressed in *Tennant v. P. & P. Union Ry. Co., supra,* and *Lavender v. Kurn, supra,* the circumstantial evidence must be entirely consistent with the cause of death. That is not the situation here. The only evidence remotely suggesting negligence was that relating to the cutting off of the caboose. Under all the evidence it is perfectly obvious that if Stephen J. Kurimsky did board the south end of the lead car he was all right long after that car had passed No. 2 switch and, therefore, could not have been caused to fall from the train by any motion of the train at the time the caboose was cut off.

Even though the evidence as to the movement and motion of the train was all oral and while the witnesses did not agree precisely as to the exact point where the train moved or stopped, there is no doubt from the evidence that the following are the facts concerning the accident, and the review of these facts clearly shows that the decision of the jury was so unreasonable that the verdict should not be allowed to stand. The facts are in accord from the eye witnesses that Stephen J. Kurimsky got off at No. 1 switch and threw the switch while the locomotive moved into No. 2 sidetrack where it automatically coupled onto the seven empty cars (36 a and 56 a). The seven cars were pulled out of No. 2 sidetrack onto the Unity main track and thence over the crossover to the northbound Bessemer main track. When this northerly movement ended the northern end

of the caboose was substantially opposite the south end of the Unity scales, shown on the map, Exhibit "A". In the meantime Stephen J. Kurimsky moved northwardly from No. 1 switch to the No. 2 switch. When the train cleared No. 2 switch Stephen J. Kurimsky threw it so that the cars would proceed along the main track to and into No. 1 sidetrack. He then gave a backup signal with his lantern and the signal was relayed by Keister, the conductor, to the engineer, as the engineer could not see Stephen J. Kurimsky because of the curve in the track and his vision was blocked by the train. The engineer started to back the train but before he had moved any appreciable distance immediately got a signal from the conductor to stop in order to cut off the caboose, and the entire movement of the train was not more than two car lengths (152 a), which would be about sixty feet. From a review of the plan it is apparent that the front of the caboose stopped at the point marked "X", Exhibit "A", and the south end of the southerly car on the train would be substantially half way from No. 2 switch to Unity crossover switch. It is also readily apparent that since the train moved only two car lengths from its extreme northerly position the lead car of the train was only about forty-five feet south of No. 2 switch when the caboose had been completely cut off. Also from the testimony it is apparent that the train moved southwardly in the No. 1 track and came to rest with the front of the locomotive at the point marked "W", Exhibit "A" (Walton 65 a), this point being approximately one hundred sixty feet south of No. 1 switch. After throwing No. 2 switch the next duty to be performed by Steve Kurimsky was to disconnect the locomotive from the seven hopper cars. This is stated by all the witnesses (Walton, 39 a; Keister, 83 a; Binkley, 171 a), even including Frank Kurimsky

(153 a). In order to get to the point where the cars would be disconnected from the locomotive Steve could either walk from No. 2 switch or ride at any point on the train (42 a) but it is logical to assume that if he rode he would mount the train at a point near where the uncoupling was to take place, to wit, between the tender and the most northerly hopper car. When the train had come to rest on No. 1 track and Steve did not appear to cut off the locomotive a search for him was made by Mr. Keister and Mr. Binkley. They went completely around the train, first passing down between the main track and No. 1 track and then up between No. 1 track and No. 2 track and then around the front or northerly end of the locomotive. They then discovered Steve's body under the rear end of the locomotive between the third and fourth driving wheels with one leg projecting out over the easterly rail between those two driving wheels (Walton, 46 a-68 a; Keister, 83 a; Binkley, 160 a and 169 a). His lantern, however, was found between the rails of No. 1 track, about forty feet south of No. 1 switch, where the letter "L" has been placed on Exhibit "A" (Keister, 63 a-65 a, 85 a-86 a and 110 a). Binkley (110 a) stated that the lantern was found about two car lengths in front of the locomotive and about fifty feet from No. 1 switch (174 a). It seems obvious, therefore, that whatever happened to Steve happened to him some place south of No. 1 switch. It could not have been the movement of the train connected with cutting off the caboose which disturbed him since the south end of the train was only a short distance south of No. 2 switch when the cutting off of the caboose had been completed. Moreover, the blood marks found on the south end of the tender (Keister, 86 a, 106 a and 107 a) and on the wheels of the first and second cars from the tender and on the hopper doors at the north end of the second car,

all indicate that in some way Steve got under only the north end of the second car and that the first car, tender and the extreme rear of the locomotive then passed over him. There were no marks on any of the hopper doors south of the front hoppers of the second car although all of the hopper doors were open (87 a, 89 a, and 108 a).

Under the above quoted evidence it is perfectly obvious that if Kurimsky did board the train it must have been at the south end of the second car from the locomotive. It is, therefore, readily apparent that the verdict of the jury was so unreasonable from the evidence that it should not be allowed to stand. All of the facts above mentioned are consistent only with the inference that Stephen J. Kurimsky boarded the train at the south end of the second car and that he fell for some reason, perhaps on account of the weather conditions existing at the time, through the hopper doors at the south end of the second car from the locomotive and thus came in contact with the hopper doors and wheels at the north end of that car and the hopper doors and wheels of the car next to the locomotive and with the footboard on the end of the tender. It is also readily apparent that Kurimsky did board the south end of the second car from the locomotive and that this could have occurred only long after the caboose had been cut off, and from the evidence at the time the caboose was cut off this car was in the vicinity of the water tank shown on the plan about one hundred sixty feet north of the point where Stephen J. Kurimsky was last seen alive. It is, therefore, the position of your petitioner that there is no evidence of negligence on the part of the defendant, no evidence that any act of the petitioner caused Stephen J. Kurimsky's death, and that the verdict of the jury is so unreasonable that it cannot be sustained.

Conclusion.

For the reasons hereinabove stated the petitioner submits a review by your Honorable Court of the decision in this case by the Court below is fully justified and it respectfully requests the issuance of a Writ of Certiorari to review said decision.

J. ROY DICKIE,

Attorney for Petitioner.

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BRIEF FOR ANNA KURIMSKY, ADMINISTRATRIX OF THE ESTATE OF STEPHEN J. KURIMSKY, RESPONDENT, IN OPPOSITION.

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Opinion Below.

The Opinion of the Supreme Court of Pennsylvania is reported at 357 Pa. 521.

Jurisdiction of the Court.

The judgment of the Supreme Court of Pennsylvania was entered on November 10, 1947 (R. 6 b). A Petition for reargument by the Petitioner was denied on November 8, 1947 (R. 20 b). The Petition for a Writ of Certiorari was filed in the Supreme Court of the United States on February 5, 1948. The Petitioner seeks to invoke the jurisdiction of this Court under the provision of Section 237 of the Judicial Code, as amended (U. S. C. A. Title 28, 2nd Sec. 344) and gives as the reason therefor that the Supreme Court of Pennsylvania has failed to properly interpret the Federal Employer's Liability Act U. S. C. Section 51, *et seq.*, 35 Stat. 65 (1908), 53 Stat. 1404 (1939), 45 U. S. C. A. Section 51 (1943), however, it is submitted by respondent that the decision of the Supreme Court of Pennsylvania is entirely in accord with the decisions of the Supreme Court of the United States in the interpretation of the Act.

Counter-Statement of Questions Presented.

1. If the jury, by its verdict, adopted the theory of the plaintiff that the deceased came to his death in the course of the movement of the train when he was dislodged from the lead car, where his duty required him to be, by the jerk of the cars when the conductor failed to notify the deceased and other members of the crew that he intended to change the orders by stopping the train and cutting off the caboose and there was substantial evidence of those facts to bear out the theory of the plaintiff, will the defendant be permitted on a Petition for a Writ of Certiorari to argue that there was evidence from which the jury might have come to a different conclusion?

2. Will the defendant be allowed to disregard vital evidence in the chain of causation—that after the deceased had thrown the switch his next duty was to board the lead car and put himself in a position to work the handbrake—on a Petition for a Writ of Certiorari?

Counter-Statement.

Anna Kurimsky, Administratrix of the estate of Stephen J. Kurimsky, brought an action in trespass under the Federal Employers' Liability Act, 45 U. S. C. Sec. 51, *et seq.*, on behalf of the widow and four minor children of Stephen J. Kurimsky to recover damages for the death of Stephen J. Kurimsky who was killed on November 30, 1944 while acting as an extra brakeman in the employ of the defendant company, in the shifting of coal cars at Unity Junction in Allegheny County, Pennsylvania. The defendant company is a common carrier owning certain railroad tracks between Unity Junction and Renton, Pennsylvania and, at the time of the accident was admittedly engaged in interstate commerce in moving empty coal cars at Unity Junction from the tracks of the Bessemer & Lake Erie Railroad and the Union Railroad Company to a mine of the Consolidation Coal Company in Renton, where the cars were to be loaded with coal and then returned to the Junction and from that point distributed by the Bessemer and Lake Erie Railroad to points outside of Pennsylvania.

At the time of the accident the deceased was 35 years of age and had been in the employ of the defendant company for 18 or 19 years as track supervisor. During the 14 months prior to his death the defendant company had required him to act as an extra brakeman at different times for periods that varied from 3 to 6 hours a day. And during that time he had acted as brakeman for a period equiva-

lent to 46 days. He was not a skilled brakeman, not having had sufficient experience. He was slow and awkward and due to that fact the engineer did not like to work with him.

The accident occurred on November 30, 1944, the first day of winter at about 6:30 in the evening. It was a cold, wintry, dark, blustery day but it was dry under foot (109 a). A member of the crew asked to be allowed to take time off to go hunting and at the suggestion of the conductor in charge of the crew, the deceased agreed to substitute for him and act as extra brakeman. The deceased began his work as an extra brakeman after lunch that day and continued to work until 6:30 that evening when he met his death. Just prior to quitting time the conductor verbally ordered the crew, consisting of the engineer, fireman, and the deceased, the brakeman, to take the engine and the caboose that was attached in front, or north end, of the engine to what is known as Empty Track No. 2, where there were seven empty 50-ton or small coal hoppers, pick up the hoppers from that track and place them upon what was known as Empty Track No. 1, where the hoppers were to be left. The crew moved over the Empty Track No. 1 with the engine and the caboose attached to it and coupled on to the seven empty coal cars. Then the crew took the coal cars over the Bessemer cross-over and was about to move on to Empty Track No. 1. At this point it was the duty of the deceased to throw Switch No. 2 so that the train might proceed south on to Empty Track No. 1. After the switch was thrown, it was his further duty to climb on to the end or lead car to the platform where he could work the hand brake so that the cars could be held in position when the train came to rest and the train having come to rest, to disengage the engine from the seven cars.

The deceased threw No. 2 switch and gave the signal with lighted lantern for the train to back up. The con-

ductor, who was standing about 120 feet north of the deceased, relayed the signal to the engineer. The train proceeded to back up and the conductor started to walk towards the engine, and away from the switch. *When the train had moved over Switch No. 2 about two car lengths, or about 62 feet, the conductor changed the order without giving any notice of his intention to change the order to the deceased, the engineer or the fireman.* The train was moving at a speed estimated between 5 miles and 10 miles an hour. And as it was so proceeding, the conductor, who was then close to the engine and more than 120 feet away from Switch No. 2, and out of the sight of the deceased, yelled out to the engineer to stop the train and to cut off the caboose. The signal to stop the train and to cut off the caboose was not given to the deceased by any member of the crew. The engineer reduced the speed of the train abruptly from the estimated speed to either a dead stop or almost to a stop. In bringing the train to a stop or almost to a stop so that the caboose could be disengaged by the flagman, two movements were involved, stopping the cars and pushing them. These movements resulted in a jar on the cars and the knocking of the deceased from the lead car into the hopper of the lead car and on to the Empty No. 1 Track where he was dragged by the train and later found under the drivers of the engine after the train had come to a stop at the point where the conductor had ordered the crew to take the train.

When the train came to a stop and the flagman and conductor did not see the light of the deceased in the vicinity of the train, they walked from the Bessemer cross-over back to the train and looked for the deceased. The flagman climbed on to the lead car and looked inside the hopper. He thought that the deceased had got on the first or lead car and then had fallen down through the hopper of the car

(187 a). They found the body of the deceased under the drivers of the engine, blood stains on the wheels of the first and second cars south of the engine, and on the doors of one of the hoppers which were open at the time of the accident. The lighted lantern of the deceased lay in the center of Empty Track No. 1 about 40 feet south of Switch No. 1 and some 60 feet or better in front of the engine.

The case was submitted to the jury and the jury returned a verdict in favor of the plaintiff in the sum of $25,000.00.

The trial court refused defendant's Motions for Judgment *N. O. V.* and New Trial. The Supreme Court of Pennsylvania affirmed the judgment.

Argument.

From Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54; Bailey v. Central Vermont R. R. Co., 319 U. S. 350; Lavender v. Kurn, 327 U. S. 645 to Ellis v. Union Pacific Railroad Co., 329 U. S. 649, your Honorable Court has laid down the following uniform rules for the review of verdicts under the Federal Employer's Liability Act, 45 U. S. C. Sec. 51, *et seq.:*

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the

credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of this function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because the judges feel that other results are more reasonable."

In the words of your Honorable Court in Tennant v. Peoria & P. U. Ry. Co., *Supra*, 321 U. S. 35:

"The scope of our review, therefore, is limited to the inquiry whether the plaintiff's allegation of negligence is supported by any substantial evidence and whether the jury could reasonably infer that such negligence was the proximate cause of the accident in question."

In Lavender v. Kurn, *et al.*, 327 U. S. 645, Mr. Justice Murphy reiterated the rule that, "The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witness and arrive at a conclusion opposite from the one reached by the jury."

In spite of these rules laid down by your Honorable Court in the cases referred to above, Petitioner has argued at great length both before the lower court and now in his Petition (Pages 14, 15, 16, 17) that there was evidence in the case from which the jury could have come to a different conclusion and could have found that the accident happen-

ed in a manner different from the way the plaintiff said and the jury found by its verdict it happened. Petitioner has even gone further than that—he has disregarded important evidence in the chain of causation—that after the deceased had thrown the switch so the train might move back over track No. 1 his next duty was to board the end, or lead car, of the train so as to be in a position to work the hand brake to hold the cars when the train had come to a stop where the conductor had ordered the crew to take the train.

It was the plaintiff's theory that the failure of the conductor to notify the deceased and other members of the crew that he intended to change the orders by stopping the train and cutting off the caboose was the proximate cause of the death of the deceased. The defendant admitted that the conductor was in charge of the crew and it was required to take its orders from him. The conductor gave a verbal order to the deceased and the crew as follows:

> "We'll go in on No. 2 and catch them seven small hoppers and set them over to No. 1 track." (95 a).

While the crew and the deceased were engaged in carrying out this order the conductor changed the order, without giving any notice or warning to the deceased, by yelling out to the engineer that the train was to be stopped and the caboose was to be disengaged from the engine. The failure to give the deceased any notice or warning that the order was being changed and the train was being stopped and the caboose disengaged from the engine resulted in a jerk of the cars. That was negligence on the part of the defendant and was the proximate cause of the death of the deceased.

When the conductor gave his first order to the crew to go to track No. 2 and engage the seven hoppers and set them

over on track No. 1 in order for the train to move on track No. 1 it became the duty of the deceased to throw switch No. 2. After having thrown switch No. 2 he had the duty to climb on the first or lead car of the train to place himself in a position where he could work the hand brake that would hold the seven cars when the train had come to rest. (Testimony Frank Kurimsky 127 a, 128 a, 129 a.)

Following the reasoning in Tennant vs. Peoria and P. U. R. R. Co., 321 U. S. 29-1 that there was a presumption that the deceased was actually engaged in the performance of those duties and exercising due care for his safety at the time of his death, it may be presumed that after the deceased had thrown the switch and the train started to back up in a southerly direction over the switch the deceased climbed on the end or lead car and started to work his way up to the platform where he would be in a position to work the hand brake. But as the train was moving over the switch, the conductor changed the order without giving any warning whatsoever to the deceased. As a matter of fact he had told no one of his intention to cut off the caboose. (William H. Keister 77 a.) Instead of the train being moved intact over the switch to the place where the cars were to be left the conductor ordered the engineer to stop the train and disengage the caboose from the engine. The conductor yelled out to the engineer to stop the train and to disengage the caboose from the front of the engine. (Robert G. Walton 43 a—William H. Keister 77 a—Frank Kurimsky 121 a, 122 a.) The reason for the change of the order was that the conductor found that it would be necessary to push 44 cars that were on track No. 4, some distance north with the engine and he did not desire to push the cars with the light caboose between the engine and the cars (78 a). The order given by the conductor to stop the train and throw off the caboose was given suddenly and at the

time the train was in motion. (Frank Kurimsky 121 a—Robert G. Walton 43 a, 208 a, 209 a.) Neither, the engineer nor the fireman knew why the order to stop was given. (Robert G. Walton 59 a.) When the order was given, it was estimated that the train was traveling at a speed of between 3 and 10 miles an hour. (Frank Kurimsky 122 a—Robert G. Walton 62 a—Charles H. Binkley 183 a.)

When the conductor changed the order and directed the engineer to stop the train and throw off the caboose, the order being a sudden one, the engineer brought the train almost to a stop and the caboose was disengaged when the train was in motion. This resulted in two movements—a sudden stopping and a pushing of the coal cars—and naturally a jerk of the cars. (Frank Kurimsky 135 a—Counsel for defendant did not object to this testimony as to the effect of the reduction of the speed of the train on the cars—138 a, 150 a—Robert G. Walton 206 a, 208 a, 209 a—Charles H. Binkley 169 a, 170 a, 183 a—William H. Keister 77 a.) The effect of the sudden stopping of the train and the resulting jerk of the cars was to throw the deceased, an inexperienced, slow awkward brakeman, into the open hopper. (Robert G. Walton 52 a, 69 a, 70 a—Frank Kurimsky 130 a—Charles C. Mills 210 a.) It is a reasonable inference or conclusion, and one that the jury adopted, that the deceased lost his balance and fell into the hopper of the lead car on which it was his duty to be. As a matter of fact it was the conclusion of the flagman, Binkley, who looked into the hopper of the lead car after the train had come to rest when he did not see the light of the deceased about the train (175 a, 176 a). Binkley testified, "He must have fallen down through the doors, if he slipped off his lantern would not have been between the tracks" (176 a).

The pictures offered in evidence by the plaintiff and made a part of the record show the inside of the hopper to have

an iron bar over the floor of the hopper and the door standing open in a vertical position. The door is opened or unfastened from outside the hopper. As a result of the iron bar over the floor of the hopper and the position of the door a person who was dislodged and fell into the hopper would have his fall momentarily checked by the bar and he would be shuffled about by the movement of the train before his body would strike the door in such a way as to force the door open and allow him to fall from the hopper on to the track. As a result, the position of the lighted lantern between the tracks did not indicate, as the Petitioner argues, that the deceased should have fallen where the jerk took place and that since the lantern was beyond the place of the jerk, the jerk had nothing to do with the fall of the deceased. From the way the track curved to the east as it left the switch, the position of the lighted lantern between the rails and the markings of the deceased's body and the position of the deceased's body after the accident it is a natural deduction that the deceased was thrown into the lead hopper. If the deceased had been hit by the train as it backed over the switch, his body and his lantern would be thrown away from the tracks. He had to be on the train to have fallen through the open hopper of the train for the lantern to lie, still lit, between the tracks and for there to be blood on the wheels and bottom of the hopper and his body to be under the drivers of the engine. (Binkley 175 a, 176 a.)

It was not the stopping of the train and the cutting off of the caboose with the resulting jerk of the cars alone that caused the death of the deceased. It was the changing of the orders to the crew that they should proceed with the empty cars over switch No. 2 to empty track No. 1 where the cars were to be left. The members of the crew and the deceased had a right to assume that once the switch was thrown and the train proceeded to back up over the switch,

the train would continue on intact to the place where the cars were to come to rest. It was the sudden changing of that order and the failure to give warning to the deceased that caused the deceased to be dislodged and meet his death. The deceased was a maintenance man, a track supervisor, who had been employed by the defendant in that capacity for over a period of 18 or 19 years. In a year and two months prior to his death he had been required by the defendant to act as an extra brakeman a total of 51 days (210 a). He was awkward and slow and naturally the engineer disliked to work with him. Without any warning to him he was placed in a position of danger by the unwarranted failure of the conductor to let him know beforehand that he intended to change the orders and because he was not aware of the sudden change of the orders and the resulting stopping and jerking of the train he came to his death.

It was reasonable inference or conclusion drawn by the jury from the evidence that the plaintiff boarded the lead car and was jolted from it when the conductor changed the order and directed the engineer to stop the train and cut off the caboose without warning the deceased.

The Petitioner not only disregards the testimony of the plaintiff that the deceased was required to board the lead car to be in a position to work the hand brake after he had thrown the switch but he also disregarded the presumption that the law allows the deceased that he was actually engaged in performing his duty when he came to his death. The Petitioner failed to offer any testimony to rebut the testimony that the deceased was required to board the lead car and to rebut the presumptions that the deceased was engaged in performing his duty when he came to his death. As a matter of fact the Petitioner ignores this evidence and he argues that the deceased must have boarded the second

car and did not come to his death because of the jerk of the train when the conductor changed the orders. He argues that the position of the lantern after the accident and the point where the jerk took place indicate that where the lantern was found was so far beyond the place of the jerk that the deceased could not have been dislodged because of the jerk and since the jerk did not cause the deceased to fall, there was no evidence of negligence on the part of the defendant. In doing so, he disregards the physical evidence that the bottom of the hopper was not open and that when the deceased was dislodged by the jerk he did not immediately fall through to the ground but did, of necessity, have his movement checked by the iron bar over the bottom of the car when he came in contact with that iron bar and then he would be shuffled back and forth by the forward and backward movement of the train until he struck the door just right so that the door would be forced out and he would fall to the ground. Although the door was open and stationary it was merely unfastened from outside and to open it far enough to allow a body to fall through would require the exertion of some force against the door. Even if there were no bottom to the car there may be some question whether the deceased would have immediately fallen out where the jerk took place.

The Petitioner gives as "Reasons Relied on for the Allowance of the Writ" (Page 9)—the single statement of the Trial Judge taken from his Opinion (240 a)

> "Nobody really knew much about what actually did happen to cause Kurimsky's death."

but the Petitioner fails to quote the entire statement of the Trial Judge relative to the negligence of the defendant upon which this case was submitted to the jury as follows (240 a):

"The jury by its verdict decided, under adequate instructions from the court, that there was evidence of negligence on the part of the defendant and that such negligence was the proximate cause of the death of Stephen Kurimsky. Our examination of the testimony did disclose negligence upon the part of the defendant and that such negligence was the proximate cause of the death of Stephen Kurimsky. This being so, the defendant's motion for judgment *non obstante veredicto* must be refused.

"The defendant's motion for a new trial is based upon the contention that the verdict was against the weight of the evidence and that the amount of the verdict was excessive.

"We do not feel that the verdict was against the weight of the evidence. As before stated, all of the employees, as well as the officers, of the defendant company appeared in court to testify and there was no serious conflict in their testimony. All witnesses appeared anxious to tell all they knew about the death of Stephen Kurimsky. Nobody really knew much about what actually did happen to cause Kurimsky's death and since there is evidence in the case which convinced the jury, and which convinced us, that there is liability in the case we cannot hold that this verdict is against the weight of the evidence."

Petitioner cites a number of decisions of your Honorable Court in which it is held that the plaintiff is required to prove that the defendant was guilty of negligence and that negligence was the proximate cause of the deceased's death. Respondent agrees with that statement of the law and submits that the respondent has proved that the defendant was guilty of negligence and that that negligence was the proximate cause of the deceased's death.

The petitioner quotes (Page 13) from the Opinion of Mr. Justice Douglas, L. 653, in Ellis v. Union Pacific Railroad Co., 329 U. S. 649, 91 L. E. 434, 67 S. C. 599 (1947) that:

> "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence and not the fact that the injuries occur."

That statement of the law has always been the law and the respondent agrees with that statement of the law and submits that the respondent did prove that the defendant was guilty of negligence and that that negligence caused the deceased's death. Respondent submits the Petitioner should have quoted from the two paragraphs following in the opinion of Mr. Justice Douglas in Ellis v. Union Pacific Railroad Co., 329 U. S. 649, 91 L. E. 434, 67 S. C. 599 (1947), in which Mr. Justice Douglas states that the evidence in the case raised substantial questions for the jury to determine that there was a reasonable basis for the verdict which it returned.

Petitioner calls to the attention of the Court (Page 13) the decision in the recent case of Julia Eckenrode, Administratrix of the Estate of John Eckenrode, deceased, appellant, v. Pennsylvania Railroad Company, CCA 3rd 1947 and seems to think it anomalous that the Court reviewed the evidence and found that there was no evidence of negligence even though the jury had returned a verdict in favor of the plaintiff. Respondent submits that it has always been the law that the reviewing court will review the testimony to determine whether under the plaintiff's theory of the case the defendant is guilty of negligence and whether the plaintiff submitted such evidence and inferences that could be drawn therefrom, that the jury could

come to a conclusion that the defendant was guilty of negligence.

In Eckenrode vs. Pennsylvania Railroad Company, CCA 3rd, the Circuit Court of Appeals, 3rd District, affirmed in a *Per Curiam* decision the judgment of the District Court of the United States for the Eastern District of Pennsylvania.

In Eckenrode v. Pennsylvania Railroad Company which is reported in 71 F. Supp. 764, the facts were as follows:

The defendant's train consisting of 22 loaded coal cars was moving upgrade on the main track in order to couple the head car to some other cars which were standing at the top of the grade. The engine was at the rear of the train, headed forward and pushing. The deceased, a brakeman, in the performance of his duties made a coupling, threw the switch at the siding so that the train could proceed up the main track and then returned to the caboose behind the engine after which the whistle was blown, the bell rung and the movement began.

After passing the switch the engine had about 200 feet to go in order to complete the movement. The train was a heavy one and in spite of the fact that the track sanding equipment was operating properly the grade was such that from time to time the driving wheels of the locomotive would slip and the train momentarily lose headway.

The engineer was sitting in the cab on the right side, or opposite to the side on which the deceased was walking along side the train. The engineer looked out the side window and saw the deceased on the siding opposite the cab walking along in the direction in which the train was moving and 10 or 12 feet away and 3 or 4 feet below. The deceased made a joking remark about getting a crow-

bar to help push the train up the hill. The engineer answered in kind. After that the engineer did not see the brakeman again until he looked out of the window about three car lengths farther on and saw his body lying on the embankment to the right of the track about 5 feet from the front part of the engine, head toward the engine and feet down the enbankment.

Plaintiff's theory of the manner in which the brakeman met his death was that in attempting to put extra sand on the track in front of the driving wheels his head had been struck by a part known as the lap and lead lever—a bar which moves forward and backward on the outside of the front drivers, very slowly when the wheels are doing their duty but very rapidly when they slip and revolve at high speed. There was evidence to support this theory in that another brakeman saw the deceased, after he had walked about a hundred feet along the siding, pick something up from the ground and start diagonally up the embankment toward the main track, holding his two closed hands out in front of him.

There was the theory of the plaintiff that the defendant was negligent in that the engineer after talking with the brakeman failed to keep a look out for the safety of the brakeman. The case was submitted to the jury on that theory and the jury was asked to determine whether the deceased brakeman was guilty of contributory negligence. The jury found that the deceased was guilty of 50% negligence but that the defendant was negligent in that the engineer failed to keep a look out for the safety of the brakeman and returned a verdict for the plaintiff. The Court reversed and entered judgment for the defendant and in doing so held that an engineer engaged in operating a slowly moving locomotive, in broad daylight, is not bound

to keep a man walking along beside the cab, 10 to 15 feet away, under continuous observation, or that his failure to do so was negligence.

The engineer could see that the deceased as he walked along the siding was not in a situation which was even potentially dangerous and the engineer knew that there was nothing in the deceased's duties which would require him to board the train or even come close to it until after the waiting cars had been coupled and the movement ended, and that he could properly have ridden in the caboose and so the Court held in that case that even under the theory advanced by the plaintiff there was no negligence on the part of the defendant.

Respondent submits that it was proper for the upper Court to review the evidence to determine whether under plaintiff's theory the defendant was negligent.

We submit that the questions involved in this case were correctly decided by the Court below in the words of Mr. Justice Linn (P. 524 & 525):

> "The jury could find that Kurimsky was on the train for the purpose of performing his duty; that he was not advised of the change of orders for the switching movement; that the sudden stopping, in the circumstances, may have jolted him off the train, whereas, if he had known of the change of orders, he might have been prepared for and have avoided the danger. The evidence brought the case within the statute. Compare *Tennant v. Peoria etc. Ry. Co.*, 321 U. S. 29; *Lavender v. Kurn*, 327 U. S. 645; *DeLellis v. P. & L. E. R. R. Co.*, 350 Pa. 436, 39 A. 2d 588, which considered the failure to warn of an unusual switch-over of an eastbound train to a westbound track."

We submit that there is no need for review by this Court.

Conclusion.

The decision below is correct and there exists no conflict between the decision of the lower court and the decisions of the Supreme Court of the United States. The construction of the Statute by the lower court accords with the long-settled and consistent interpretation thereof by the Supreme Court of the United States.

We, therefore, respectfully submit that the petition for a writ of certiorari should be denied.

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